95-951

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No. _____

In The

Supreme Court of the United States

October Term, 1995

LESLIE U. HARRIS, On Behalf Of Himself and All Others Similarly Situated,

Petitioner,

vs.

CHASE MANHATTAN BANK, N.A., and DOES 1 THROUGH 50,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. As a matter of federal law, does the statutory phrase "interest at the rate allowed by the laws of the State . . . where the bank is located," contained in 12 U.S.C. §85, include contingent, sum-certain penalty charges in the form of late payment fees so as to preempt California's statutory limitations on the form or amount of contractual liquidated damages on revolving credit accounts?

2. May Congress constitutionally delegate to Delaware the power to define the federal term "interest" for all fifty States so as to preempt other States' contract and consumer protection laws?

3. Did Congress intend Delaware's legislative definition of "interest," as set forth in Del. Code Ann. tit. 5, §§945 and 950, to define the federal term "interest" in §30 of the National Bank Act, enacted by Congress in 1864 and now codified at 12 U.S.C. §85, and thereby displace California's contract and consumer protection laws limiting the form or amount of liquidated damages for late payments on revolving credit accounts?

PARTIES TO THE PROCEEDING

Petitioner, who was plaintiff and appellant in the court below, is Leslie U. Harris, a resident of San Francisco, California. Respondent, who was defendant and respondent in the courts below, is Chase Manhattan Bank, N.A., a federally insured state chartered bank located in Delaware.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Leslie U. Harris, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, First Appellate District, Division Two, as affirmed by the Supreme Court of California, which held in this case that the lawfulness of loan charges made by Respondent, Chase Manhattan Bank, N.A. ("Chase" or the "Bank"), a federally insured state chartered bank, has been entrusted to Delaware, the Bank's home state, so that Delaware law operates to preempt any and all conflicting California contract and consumer protection laws imposing limitations on liquidated damages that may be charged on credit cards held by California residents.

As set forth herein, the decision of the court below, which was affirmed by the Supreme Court of California, conflicts with the decision of the Supreme Court of New Jersey in *Sherman v. Citibank N.A.*, No. A-102-94, 1995 N.J. LEXIS 1355 (Nov. 28, 1995), and its companion case, *Hunter v. Greenwood Trust Co.*, No. A-103-94, 1995 N.J. LEXIS 1354 (Nov. 28, 1995). In *Sherman*, the New Jersey court held that late payment fees are not "interest" within the intent and purpose of the National Bank Act and that the statutory phrase "interest at a rate allowed by the laws of the State . . . where the bank is located," 12 U.S.C. §85, refers *only* to the periodic percentage rate charged on outstanding balances. *Sherman*, 1995 N.J. LEXIS 1355, at *14. Thus, not only was this case wrongly decided in the courts below, but there is a disagreement among the state supreme courts on the issue.

OPINIONS BELOW

The decision of the California Court of Appeal, which is reported as *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal. App. 4th 1563, 35 Cal. Rptr. 2d 733 (1994), is reproduced in the Appendix. A-20 to A-32. The orders of the Supreme Court of California granting review of the Court of Appeal's decision and then dismissing review, which are not published, are also reproduced in the Appendix, *see* A-33 to A-34, along with the unpublished order of the Superior Court of the City and County of San Francisco sustaining Chase's demurrer to Petitioner's amended complaint, *see* A-18 to A-20 (order); A-1 to A-17 (complaint).[1]

JURISDICTION

The Supreme Court of California entered its judgment in this case on November 2, 1995. A-34. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(a).

[1] On February 23, 1995, the Supreme Court of California, acting on its own motion, ordered review of the California Court of Appeal's decision in this case. *Harris v. Chase Manhattan Bank*, 1995 Cal. LEXIS 1094, 38 Cal. Rptr. 2d 346, 889 P.2d 540 (1995). *See* A-33. On November 2, 1995, following the issuance of its decision in *Smiley v. Citibank (S.D.), N.A.*, 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (1995), *petition for certiorari filed* (Nov. 30, 1995), the Supreme Court of California dismissed review. *Harris v. Chase Manhattan Bank, N.A.*, No. S044161, 1995 Cal. LEXIS 6762 (Nov. 2, 1995). *See* A-34.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 1, of the United States Constitution states in pertinent part that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, §1.

The Supremacy Clause provides:

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The Full Faith and Credit Clause requires, in relevant part, that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, §1.

Section 30 of the National Bank Act, which is codified as 12 U.S.C. §85 (hereinafter "§85"), provides in pertinent part:

> Any [national bank] may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, *interest at the rate allowed by the laws of the State . . . where the bank is located*, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever

> may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title.

12 U.S.C. §85 (emphasis added). Prior to codification, §30 of the National Bank Act also provided what is now codified, in pertinent part, in 12 U.S.C. §86:

> The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid . . . may recover back, in an action in the nature of an action on debt, twice the amount of the interest thus paid. . . .

12 U.S.C. §86.

Section 1671 of the California Civil Code states in pertinent part:

> (b) Except as provided in subsection (c), a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made.
>
> (c) The validity of a liquidated damages provision shall be determined under subdivision (d) and not under subdivision (b) where the

> liquidated damages are sought to be recovered from either:
>
> (1) A party to a contract for the retail purchase, or rental, by such party of personal property or services, primarily for the party's personal, family, or household purposes; or
>
> (2) A party to a lease of real property for use as a dwelling by the party or those dependent upon the party for support.
>
> (d) In the cases described in subdivision (c), a provision in the contract liquidating damages for the breach of the contract is void except that the parties to such a contract may agree therein upon an amount which shall be presumed to be the damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

Cal. Civ. Code §1671(b)-(d).

Section 945 of Title 5 of the Delaware Code, entitled "Interest charges," provides in pertinent part:

> In addition to or in lieu of interest at a periodic percentage rate or rates . . . , a bank may, if the agreement governing the revolving credit plan so provides, charge and collect, as interest, in such manner or form as the plan may provide, 1 or more of the following:
>
> (1) A daily, weekly, monthly, annual or other periodic charge in such amount or amounts as the agreement may provide for the privileges made available to the borrower under the plan;

> (2) A transaction charge or charges in such amount or amounts as the agreement may provide for each separate purchase or loan under the plan;
>
> (3) A minimum charge for each daily, weekly, monthly, annual or other scheduled billing period under the plan during any portion of which there is an outstanding unpaid indebtedness under the plan. . . .

Del. Code Ann. tit. 5, §945. Section 950 of Title 5 of the Delaware Code, which is entitled "Delinquent installments," provides in pertinent part:

> If the agreement governing a revolving credit plan so provides, a bank may impose, as interest, a late or delinquency charge upon any outstanding unpaid installment payments or portions thereof under the plan which are in default; provided, however, that no more than 1 such late or delinquency charge may be imposed in respect of any single such installment payment or portion thereof regardless of the period during which it remains in default. . . .

Del. Code Ann. tit. 5, §950.

STATEMENT OF THE CASE

A. Introduction

This Petition raises important constitutional and public policy issues concerning the scope of federal preemption in the areas of contract and consumer protection law affecting many thousands of California residents (as well as residents of many other states) who use credit or

charge cards and who are periodically charged late payment fees amounting to well over $1 billion annually.[2] The California courts erroneously held in this case that the law of Delaware – Chase's home state – provides the definition of the federal term "interest" in §85 of the National Bank Act, 12 U.S.C. §85, and preempts California statutory and common law of contracts and consumer regulation governing the amount of liquidated damages chargeable for late payment on a credit card contract held by a California consumer.

As set forth herein, the decision of the courts below (and other decisions which have reached the same result)[3] impermissibly reverse this Court's presumption

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[2] According to one expert, who cited a banking industry estimate, credit card issuers collect about $1.5 billion in late payment fees annually, over and above interest charges. *See* Russ Bleemer, *Court May Chip Away Credit-Card Late Fees*, N.J.L.J., Feb. 20, 1995, at 4. Similarly, one industry source reports that late payment charges exacted by credit card-issuing banks totaled almost $2 billion in 1992. *See Credit Card News*, April 1, 1994, at 2; *see also Smiley*, 900 P.2d at 716 (Arabian, J., dissenting) (citing industry reports); General Accounting Office, *U.S. Credit Card Industry: Competitive Developments Need to Be Closely Monitored* (April 1994); Robert A. Burgess & Monica A. Ciolfi, *Exportation or Exploitation? A State Regulator's View of Interstate Credit Card Transactions*, 42 Bus. Law. 929, 936 (1987).

[3] *See, e.g., Smiley*, 900 P.2d at 702 (collecting federal and state court decisions); *see also* Barkley Clark & Barbara Clark, *The Law of Bank Deposits, Collections and Credit Cards* ¶15.09[2][c], at 15-56 to 15-61 (Rev. ed. 1995) (same); Darrell L. Dreher, Hugh M. Hayden & Michael C. Tomkies, *Survey: Consumer Financial Services Law – Developments in the Interstate Delivery of Consumer Financial Services*, 50 Bus. Law. 1093 (1995); Michael C. Tomkies, *Interstate Consumer Credit Transactions: Card Issuers Win Fee Exportation Cases*, 47 Consumer Fin. L.Q. Rep. 105 (1993).

against preemption. Even though recognizing that there were no clear statements in §85 of the National Banking Act – or its legislative history – of Congressional intent to preempt state regulation of liquidated damages on revolving credit accounts, nevertheless the courts below improperly held that Congress *intended* to preempt state law in this instance. As a result, Delaware law, which improperly expands the definition of the federal statutory term "interest," preempts without limitation the contract and consumer protection laws of the other states. The result in this case is one that ignores not only an unambiguous statutory text and a clear legislative history but what is perhaps the most prominent feature of U.S. banking since the National Banking Act was enacted during the War Between the States – the dual banking system, under which Congress has historically deferred to the interests of the individual states (here California) in the regulation of national banks as to all matters except those essential to their role as instrumentalities of the federal government.

B. Background Facts

The facts of this case are, in the words of the court below, "simple and undisputed." A-21. Chase, which has been a federally insured state chartered bank located in Delaware since June 21, 1990, issues Visa and MasterCard credit cards from Delaware to consumers all over the U.S., including Petitioner, who resides in San Francisco. Under the Bank's cardholder agreement, in addition to interest charged at an annual percentage rate, Petitioner must make a minimum payment by the due date shown on the periodic statement which he receives from Chase.

If the cardholder fails to make such payment by the due date, Chase charges a $10.00 late payment fee regardless of the outstanding balance, the amount of the payment owed, or the actual number of days the payment is late. On February 20, 1992, the Bank assessed such a late payment fee to Petitioner's account. A-21.

C. Proceedings In The Courts Below

Petitioner responded by filing this class action lawsuit in the Superior Court of the City and County and San Francisco asserting various California state law claims and seeking damages and injunctive relief. In an amended complaint, Petitioner alleged that the late payment fee imposed by Chase constituted a liquidated damages penalty in violation of §1671 of the California Civil Code, an unlawful, fraudulent, or unfair business act or practice, a breach of the duty of good faith and fair dealing, fraud and deceit and a breach of contract. A-1; A-17 to A-21. The gravamen of Petitioner's action was that the credit card late payment fee charged by the Bank violates California law because it is in the nature of a penalty or liquidated damages for breach of the credit card agreement, having no relation to the actual damages incurred by Chase as a proximate result of such breach. A-22.

Chase demurred to Petitioner's amended complaint on federal preemption grounds. Relying on the First Circuit's decision in *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 974 (1993), Chase argued that under Delaware law, the state where it is "located," 12 U.S.C. §85, the subject late

payment fee fits within the definition of "interest," set forth in Del. Code Ann. tit. 5, §§945, 950. A-21 to A-22. Sustaining Chase's demurrer, the Superior Court held that Petitioner's California state law action against the Bank was preempted by §85 of the National Banking Act and §521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), 12 U.S.C. §1831d(a), and dismissed Petitioner's amended complaint without leave to amend. A-18 to A-19.

On appeal, the California Court of Appeal affirmed. Agreeing with Chase that under the law of the Bank's home state of Delaware the subject late payment fee fits within the statutory definition of "interest," the court below stated the question presented as whether "Chase may 'export' Delaware's law applicable to late fees, even though it may conflict with California law governing liquidated damage penalties." A-22. Agreeing with the reasoning expressed by the First Circuit in *Greenwood Trust*, 971 F.2d at 823-29, the Court of Appeal held that either §85 of the National Banking Act or §521 of DIDA "preempt contrary state laws regulating late charges and other flat fees in connection with credit card lending." A-25 (citations omitted). Thus, in the words of the California Court of Appeal:

> We conclude that because Chase is chartered in Delaware, [§]521 [of the DIDA] and the supremacy clause mandate that Delaware rather than California law controls its imposition of late charges on [Petitioner's] credit card account. The trial court thus correctly determined that [Petitioner's amended] complaint based on Chase's alleged violation of California restrictions on such charges, is preempted.

A-32. As noted above (*see* note 1, *supra*), the Supreme Court of California initially granted review of this case, but California's highest court dismissed review herein. A-33 to A-34.

REASONS FOR GRANTING THE WRIT

This Court should review and reverse the decision of the court below because (1) it conflicts with the recent decisions of the Supreme Court of New Jersey in *Sherman*, 1995 N.J. LEXIS 1355, and its companion case, *Hunter*, 1995 N.J. LEXIS 1354, which held that late payment fees are not "interest" within the statutory language, legislative intent and purpose of the National Banking Act, 12 U.S.C. §85; (2) it ignores the presumption against preemption established by this Court a century ago and endorses a form of supremacy by one state (Delaware) over other states (including California); and (3) it has an immediate and irrevocable impact upon many thousands of consumers, as well as the 50 states and the national banks.[4]

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[4] The conflicts between the states and the impact upon consumers resulting from the result in this case cannot be overemphasized. As dissenting Justice Arabian of the Supreme Court of California recently wrote:

> The setting of *non*-interest-rate credit card terms – like the late payment penalties charged California credit card users by out-of-state national banks at issue in this case – is a matter appropriate for regulation by the California legislature. It is not one to be determined by the legislatures of a handful of small or sparsely populated states that have deregulated

As set forth in the following section, this Petition should also be granted because the reasoning of the California courts in this case is flawed and reaches the wrong conclusion for the following reasons elucidated by the Supreme Court of New Jersey in *Sherman*: (1) the statutory language and legislative history of §85 of the National Banking Act does not support the expansive reading of the term "interest" reached in this case; (2) the so-called "most-favored-lender" doctrine relied on by the California courts does not allow the exportation of late payment fees; (3) the language and legislative history of §521 of DIDA actually support the conclusion that preemption of state law credit card regulation is confined to traditional numerical interest rates; (4) the First Circuit's decision in *Greenwood Trust* does not support the notion that the federal statutory term "interest" includes late

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> consumer credit in an attempt to attract the interstate credit card operations of large national banks.

Smiley, 900 P.2d at 708 (Arabian, J., dissenting) (emphasis in original; footnote omitted). Justice Arabian also quoted Judge Ginsburg on this important point:

> "We have already seen Citicorp relocating some of its retail operations in South Dakota, and the Chase Manhattan and Morgan Banks undertaking similar moves to Delaware. . . . In return for jobs and taxes, these jurisdictions have traded local entry rights and powers, but in each case their real purpose is to serve as a base state for [national] retail banking: the national charter enables the banks to extend credit to residents of other states at their new 'home' state interest rates, and newly provided state laws make these interest rates unlimited."

Id. at 708 n.1 (Arabian, J., dissenting) (quoting Douglas Ginsburg, *Interstate Banking*, 9 Hofstra L. Rev. 1133, 1370 (1981)).

payment fees; (5) interpretive rulings of the federal Office of the Controller of the Currency concerning the meaning of "interest" are not entitled to deference in this case; and (6) Chase's late payment fees are impermissible under California law.

ARGUMENT

D. The Decision Of The Court Below Conflicts With The Recent Decision Of The Supreme Court Of New Jersey In *Sherman* On The Same Federal Issues

1. Introduction

In every significant aspect, the decision of the Supreme Court of New Jersey in *Sherman* conflicts with the decision of the California courts in this case. Moreover, *Sherman* conflicts with the First Circuit's decision in *Greenwood Trust*, thereby further compelling this Court to grant this Petition in order to resolve a growing split in federal and state court precedent on an important legal issue.[5] *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (granting

[5] In *Sherman*, 1995 N.J. LEXIS 1355, at *35, the Supreme Court of New Jersey refused to follow and specifically criticized the recent decision of the Supreme Court of California in *Smiley*. In *Copeland v. MBNA America Bank, N.A.*, No. 94SC409, 1995 Colo. LEXIS 743 (Nov. 20, 1995), the Colorado Supreme Court seemingly followed California's lead and held that Colorado law was preempted by Delaware law, the law of the bank's home state. *Id.* at *5-*6. On the other hand, Pennsylvania's intermediate appellate court has ruled in favor of credit card holders in two cases, finding that there was no preemption of state law.

certiorari in parallel federal and state cases to resolve conflict between state and federal courts over interpretation and implementation of Indian treaty fishing rights); *Arizona v. Roberson*, 486 U.S. 675 (1988) (same – conflict between state court decisions).

In at least six significant aspects, the decision of the California courts in this case conflicts with the decision of the Supreme Court of New Jersey in *Sherman*, thereby compelling review by this Court of the important issues presented herein.

2. The Statutory Language And Legislative History Of The National Banking Act Does Not Support The Expansive Reading Of The Term "Interest" Offered By The Court Below

Starting with the slender reed of legislative purpose that "[t]he intent of [§]85 [of the National Banking Act] was to protect national banks from discriminatory state banking laws and insure ' "competitive equality" ' between state and national banks," A-23 (quoting *Greenwood Trust*, 971 F.2d at 826 n.6), the court below bootstrapped the conclusion that "[v]iewed from [a] historical

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See Mazaika v. Bank One, N.A., 439 Pa. Super. 95, 653 A.2d 640 (1994) (en banc), *appeal granted*, 659 A.2d 557 (1995); *In re Citibank Credit Card Litig.*, 439 Pa. Super. 79, 653 A.2d 39, *appeal granted*, 659 A.2d 984 (1995). As indicated, the Pennsylvania Supreme Court has granted discretionary review in both cases. In addition, an appeal embracing many of these issues is pending before the Third Circuit, having been argued before a panel of that court on February 2, 1995. *See In re Consolidated Credit Card Appeals*, Nos. 94-3203/04, 94-3215/16/17/18 (3d Cir. pending).

perspective, Congress's intent to define 'interest' in the broadest sense for preemption purposes could not be more clear." A-27. This distorted reading of precise federal statutory language and clear legislative history cannot be squared with reality or precedent.[6]

"On its face," as the New Jersey court stated in *Sherman*, 1995 N.J. LEXIS 1355, at *17, §85 of the National Banking Act immunizes national banks that lend money beyond their home state's borders from local usury laws that might give local banks a competitive advantage. However, "neither the plain meaning of the terms 'rate' and 'interest' in [§]85, nor the legislative history of that provision, indicates that these terms carry the expansive meaning inferred by Citibank" in that case, or by the court below and Chase in this case. *Id.* at *18 (citing *Smiley*, 900 P.2d at 717) (George, J., dissenting).[7] As a

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[6] *See, e.g., Copeland v. MBNA America, N.A.*, 820 F. Supp. 537, 541 (D. Colo. 1993) ("[A] proposition that is not obvious from the plain meaning of a statute's language, nor from its legislative history, simply cannot be regarded as a clear manifestation of congressional intent."); *Mazaika*, 653 A.2d at 647 ("[W]e are simply unable to find that Congress, when it used the phrase 'interest at the rate' in enacting [§]85 of the National Banking Act, intended anything other than the ordinary and popular meaning of the word 'interest', which a person of average intelligence and experience would understand.") (footnote omitted).

[7] As Justice George of the Supreme Court of California elaborated in his dissenting opinion in *Smiley*, "[t]here is absolutely nothing in [§]85 that suggests that Congress, when it enacted this provision in 1864, intended the statutory reference to 'interest' to include" late payment fees; indeed, at the time of the 1864 enactment, this Court's decisions on the subject "made it quite clear that such a late payment charge, whose payment was contingent upon the borrower's own conduct during the

result, the New Jersey court clearly (and correctly) disagreed with the result reached by the court below in this case.

This result reached by the Supreme Court of New Jersey in *Sherman* is dictated by well-established rules of federal statutory interpretation which the California courts ignored. First, this Court looks at the statutory language itself. *United States v. Turkette*, 452 U.S. 576, 580 (1981). Where the language is clear and certain, the statute should be construed as written, because the function of the court, in such a case, is to enforce the statute according to its terms. *Touche Ross & Co. v. Reddington*, 442 U.S. 560, 568 (1979). Where, however, the statutory language is ambiguous or unclear, resorting to legislative history is appropriate in order to arrive at an interpretation that effectuates legislative intent. *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

It is undisputed that §85 of the National Banking Act does not provide a definition for the term "interest" or "interest at the rate." 12 U.S.C. §85. *See Smiley*, 900 P.2d at 697 ("We cannot find the meaning of the term 'interest' in [§]85 itself. The provision simply does not define the word.") (citations omitted).[8] Similarly, the legislative history of the National Banking Act, which indicates only

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term of the loan, would not be considered interest for the purpose of determining whether the loan exceeded the legally permitted rate of interest." 900 P.2d at 718 (George, J., dissenting) (citing *Spain v. Hamilton's Administrator*, 68 U.S. (1 Wall.) 604, 626 (1864), and *Lloyd v. Scott*, 29 U.S. (4 Pet.) 205, 226 (1830)).

[8] As dissenting Justice George of the Supreme Court of California concurred with the majority in *Smiley*, "Section 85 includes no special definition of the term 'interest' as used in the

that the statute's purpose was to create a centralized federal national banking system which would facilitate interstate commerce by issuing a reliable form of currency, *see Veazie Bank v. Fenno*, 75 U.S. 533, 536-39 (1869), does not directly address whether late payment fees are a form of "interest." *See Smiley*, 900 F.2d at 699; *Copeland*, 1995 Colo. LEXIS 743, at *10. Thus, in the recent words of Justice Arabian of the Supreme Court of California, "there is not a particle of textual or legislative evidence to support" the notion that when it enacted the National Banking Act, Congress had in mind not only "interest" in its popular sense – a sum charged for the lending of money, calculated at a periodic percentage over time, that is, rates of interest – but non-interest-rate credit terms such as late payment fees. *Smiley*, 900 P.2d at 709 (Arabian, J., dissenting).

In this case, however, the court below ignored the clarity of the federal statutory language and the true meaning of its legislative history in ascribing to the Congress of 1864 a broad construction of the term "interest"

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statute, and no indication that the term was used in other than its ordinary and commonly understood sense." 900 P.2d at 717 (George, J., dissenting). Thus, as numerous cases have recognized, "a late payment charge that is set at a fixed-dollar amount unrelated either to the amount of the loan or the time period for which funds are advanced, and that is assessed only if the borrower fails timely to make a required payment, ordinarily is not considered 'interest.' " *Id.* (citing *Tackett v. First Sav. of Arkansas, F.A.*, 306 Ark. 15, 810 S.W.2d 927, 931-32 (1991); *Rangen, Inc. v. Valley Trout Farms*, 104 Idaho 284, 658 P.2d 955, 957-60 (1983); *Barbour v. Handlos Real Estate & Bldg. Corp.*, 152 Mich. App. 174, 393 N.W.2d 581, 587 (1986) ($15.00 late payment fee "do[es] not constitute interest")).

that cannot be justified. The recent decision of the Supreme Court of New Jersey in *Sherman* has highlighted the gross errors evident in the cursory analysis undertaken by the California courts and the result in this case compels review by this Court.

3. The So-Called "Most-Favored-Lender" Doctrine Does Not Allow The Exportation Of Late Payment Fees

Since 1874, §85 of the National Banking Act has been interpreted as entitling a national bank to charge the highest interest rate allowed to lenders by the law of the state in which the bank is located under the so-called "most-favored-lender" doctrine announced by this Court in *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409, 411-13 (1874). In *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 317-19 (1978), this Court relied on the National Banking Act and the most-favored-lender doctrine in holding that a national bank's authorized exportation of lending terms was *limited to* numerical percentage-rate interest terms. Contrary to the assertion of the court below, *see* A-23, however, the *Marquette* Court made no mention of the exportation of *other* credit card terms, such as late payment charges, nor did its reasoning or rationale imply that discrete and specialized charges affixed to credit card loans could be imposed on customers in other states. As the Supreme Court of New Jersey stated in *Sherman*:

> *Marquette* does not mandate or encourage an extension of the "most-favored-lender" status to expand the definition of "rates" to include other non-interest rate charges. The national

> bank's authorized exportation of lending terms in *Marquette* was limited to numerical percentage-rate interest terms. The Court made no mention of the exportation of other credit-card terms, such as late charges, nor did its reasoning or rationale imply that discrete and specialized charges affixed to credit-card loans could be imposed on customers in other states.

1995 N.J. LEXIS 1355, at *21 (citing *Smiley*, 900 P.2d at 713-14 (Arabian, J., dissenting).[9]

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[9] In *Smiley*, dissenting Justice Arabian of the Supreme Court of California pounced on the notion that when Congress spoke of "interest rates" more than a century ago, it really meant something more than that, namely, non-interest-rate charges, *including* late payment penalties:

> The vice of this reasoning is that neither the [Supreme Court] in *Marquette* nor the Congress of 1864 wrote or legislated against a backdrop of interstate banking, an arrangement that did not exist even in 1978 and was inconceivable in 1864. . . .
>
> The opinion in *Marquette*, of course, addressed only the question of interest rates; it does not hint at, much less embrace, the Pickwickian notion of "interest" embraced by the majority. . . .
>
> Given the system of regional banking that even today continues to be the prevailing pattern, it is evident that in 1864 American banks did not "export" rates across state lines or that they even conceived of doing so. Congress thus could not have legislated with an awareness, however unarticulated, of "true" interstate banking as we are only coming to perceive it, however dimly, today. The pressures that drive the economic behavior of Citibank and like banks (and that lead to class actions such as this one) were unknown to the world of American banking until around 20 years ago. Because the Congress of the

Yet, in this case the court below misread *Marquette* and the "most-favored-lender" doctrine to justify an expansive reading of the federal statutory term "interest." A-23, A-27. Once again, the *Sherman* court has correctly interpreted the applicable law and its cogent analysis demonstrates why this Court should grant review in this case.

4. Section 521's Language And Legislative History Supports The Conclusion That Preemption Of State Credit Card Regulation Is Confined To Traditional Numerical Interest Rates

While the language of §521 of DIDA, enacted in 1980, essentially mirrors §85 of the National Banking Act and, as a result, §521 has been interpreted as conferring on federally insured state banks the same insulation from state usury laws that national banks have enjoyed under §85,[10] the legislative history of DIDA strongly supports

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> Civil War era could not have foreseen such developments, it could not have enacted [§]30 of the National Bank Act with the idea of "interest" . . . that permits the exportation of credit terms – including late payment penalties – unrelated to interest rates allowed by the exporting bank's home state.

900 P.2d at 713-14 (Arabian, J., dissenting) (citations omitted).

[10] DIDA was enacted in 1980 following an enormous credit crunch in which interest rates rose to record levels. National banks, which could lend money at one percent (1%) above the Federal Reserve discount rate, were perceived to have a distinct competitive advantage over their state-chartered counterparts, which were bound by state usury laws. In order to equalize this advantage, Congress enacted legislation permitting state-chartered banks to export the interest rates of their home states

the understanding that "preemption of credit-card regulation under DIDA is confined to traditional numerical interest rates." *Sherman*, 1995 N.J. LEXIS 1355, at *23. Thus, contrary to the conclusion reached by the California courts in this case, *see* A-23 to A-24, when enacting §521, Congress did not intend to bar states from prohibiting late payment fees by credit card issuers. *Sherman*, 1995 N.J. LEXIS 1355, at *23-*27.

In *Sherman*, the Supreme Court of New Jersey stated that "[a] fair reading of the [DIDA's] legislative history indicates that Congressional concern was focused with particularity on numerical or percentage interest rates," *id.* at *25, and quoted statements from the legislation's sponsors in support of this conclusion. *Id.* at *25-*26. The New Jersey court also observed that post-DIDA legislative history tends to confirm the conclusion that Congress in 1980 did not intend to bar states from prohibiting late payment fees by credit card issuers, noting that in 1981

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abroad, as national lending institutions had been doing through the National Banking Act. *See* A-23 to A-24; *Sherman*, 1995 N.J. LEXIS 1355, at *22-*25. *See generally* William S. Burke & Alan S. Kaplinsky, *Unraveling the New Federal Usury Law*, 37 Bus. Law. 1079, 1096-97 (1982). Consequently, §521 of DIDA borrowed language extensively from §85 of the National Banking Act, but also added a preemption clause. *See* 12 U.S.C. §1831d(a) ("In order to prevent discrimination against State-chartered insured depository institutions . . . with respect to interest rates," a state bank "may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section," charge interest at the "rate allowed" by the laws of its home state, or one percent (1%) over the Federal Reserve discount rate, whichever is greater.)

and in 1983-1984 the Senate (but not the House of Representatives) passed amendments to DIDA which would have expanded preemption of state usury laws, but would have expressly exempted late payment charges from preemption. *Id.* at *26. Thus,

> the fact that Congress was specifically concerned about effecting a presumption limited to numerical interest rates is significant. If we cannot attribute to legislative initiative of 15 years ago the intent to include discrete, specialized charges within a definition of interest, we cannot ascribe that expansive definition to a legislative initiative that occurred over 100 years earlier. That is especially so when the later statute substantially paralleled the language of the former, and it was passed in an effort to give federally-insured state banks status equal to national banks that had enjoyed a superior status since the enactment of the earlier act. Thus, it would be contrary to common sense to conclude that in enacting the [National Banking Act], Congress contemplated an open-ended and expansive concept of interest that was light years from the traditional understanding of a fixed, basic percentage rate applied to an unpaid loan balance.

Id. at *27. Once again, in *Sherman* the New Jersey court has demonstrated the grievous analytical errors committed by the California courts in this case, presenting yet another reason why review should be granted.

5. The First Circuit's Decision In *Greenwood Trust*, Which The Court Below Followed In This Case, Does Not Support The Notion That The Federal Statutory Term "Interest" Includes Late Payment Fees

While the California Court of Appeal's decision relied unquestioningly on the First Circuit's decision in *Greenwood Trust*, 971 F.2d at 823-29, and several district court cases which slavishly followed it, *see* A-24 to A-25, the Supreme Court of New Jersey correctly concluded in *Sherman* that those cases "are unpersuasive and do not support the conclusion that Congress intended to include non-interest rate charges in its understanding of 'interest.' " 1995 N.J. LEXIS 1355, at *28. Noting that *Greenwood Trust* asserted that prior case law supported the notion that federal common law construes "interest" to encompass a variety of lender-imposed fees and financial requirements that are independent of a numerical percentage rate (reasoning which the California courts wholeheartedly embraced in this case, A-24 to A-25), the *Sherman* court correctly countered that "[i]nimical to the holding in *Greenwood Trust*, a careful examination of the cases cited [by the First Circuit] does not establish that Congress intended to include late-payment fees within a federal definition of interest" under either §85 of the National Banking Act or §521 of DIDA. 1995 N.J. LEXIS 1355, at *28-*29.[11]

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[11] In *Sherman*, the Supreme Court of New Jersey also rejected Citibank's reliance on the decision of the Supreme Court of California in *Smiley* to support its position that "interest" under §85 of the National Banking Act includes late payment charges. Regarding the California court's decision, the

In this case, however, the California Court of Appeal accepted the conclusion reached by the First Circuit in *Greenwood Trust* without properly analyzing the legal issues involved. With these flaws having been highlighted by the Supreme Court of New Jersey in *Sherman*, this Court should grant review to resolve this issue.

6. Interpretive Rulings Of The Office Of The Controller Of The Currency Concerning The Meaning Of "Interest" Are Not Entitled To Deference In This Case

Contrary to the conclusion of the court below, *see* A-25 to A-26, in *Sherman* the New Jersey court correctly held that a 1988 interpretive ruling issued by the Office of the Controller of the Currency ("OCC"), the federal agency charged with enforcement of the National Banking Act, is not strong evidence that late payment fees constitute "interest" for purposes of that federal statute;[12] indeed, as the Supreme Court of New Jersey stated, the "soundness of this ruling, and its value as authority, are

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New Jersey court stated that "[t]he majority [opinion] in *Smiley* bases that conclusion in large measure on its understanding of historical legal usage," *id.* at *35 (citing *Smiley*); however, "[i]n our view . . . interest in its historical setting is limited to a periodic charge expressed as a percentage of a principal balance due." *Id.*

[12] In this case, the California Court of Appeal stated that in Interp. Letter 452, Fed. Banking L. Rep. (CCH) ¶85,676 (Aug. 11, 1988), the OCC took the position that state laws regulating late charges by banks are preempted by federal banking statutes, a pronouncement which the court below held was entitled to "deference by the courts." A-25 (citations omitted).

greatly undermined when placed in the context of conflicting OCC rulings." *Sherman*, 1995 N.J. LEXIS 1355, at *36. As *Sherman* explained, an examination of OCC interpretative letters over the years reveals "significant inconsistent administrative treatment" of the term "interest" in respect of the National Banking Act. *Id.* at *40.

In this case, the court below failed to conduct a critical historical analysis of the OCC interpretative letters, yet it gave that federal agency an unjustified deference that its inconsistent treatment of these issues scarcely deserves. Once again, this failure on the part of the California Court of Appeal demonstrates why review should be granted by this Court.

7. The Bank's Late Payment Fees Are Impermissible Under California Law

Rejecting the ultimate conclusion embraced by the court below in this case, *see* A-32, in *Sherman* the Supreme Court of New Jersey held that "[c]onsumer credit protection is a fundamental local interest, long recognized by Congress, and it thus should not be displaced by the sweeping preemption" urged by the bank; thus, because New Jersey law prohibited banks from charging late payment fees, "we hold that [Citibank's] late-fee charges violate this state's usury laws and are thus impermissible." 1995 N.J. LEXIS 1355, at *59. The same result should have been reached by the California courts in this case, which abdicated their constitutional duty to uphold the contract and consumer protection laws of this State (particularly §1671 of the California Civil Code) in favor of Delaware law.

Each one of the six reasons discussed above presents compelling grounds for this Court to grant review in this case. Moreover, the failure of the court below to properly apply the applicable preemption doctrines (as discussed below) presents additional reasons why this Petition should be granted.

E. The Decision Of The Court Below Wrongly Applied A Presumption Against Preemption, Rather Than The Proper Standard

When considering Chase's preemption claim, the California courts should have heeded the longstanding presumption that "Congress did not intend to displace state law," *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981), and that they should not unnecessarily disturb "the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). Where the field that Congress is said to have preempted has been traditionally occupied by the states, " 'the historic police powers of the States [are] not to be superseded by . . . [a] Federal Act unless that [is] the *clear and manifest purpose* of Congress.' " *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) (plurality opinion) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (emphasis added).

This presumption is particularly applicable in this case, which involves both banking and consumer protection laws. It is well-settled that state usury law restrictions on lending practices are so extensive and historically rooted as to form part of the consumer protection terrain traditionally occupied by the states. *See, e.g., Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980)

("We readily accept the submission that, both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern."); *see also Smiley*, 900 P.2d at 715 (Arabian, J., dissenting) ("So solicitous has Congress historically been of the interests of the states in the regulation of banking, both state and federally chartered, that the [Supreme Court] has adopted an *especially restrictive standard of preemption* by which to judge federal laws that impact state regulation of federal banks.") (emphasis added). That preemption test, announced by this Court a century ago in *McClellan v. Chipman*, 164 U.S. 347, 357 (1896), requires the invalidation of a state law only where it "incapacitates the [national] banks from discharging their duties to the government. . . . "[13]

The preemption test specially applicable to state banking laws as they affect national banks, reflecting as it does a generous deference to state banking laws in the regulation of federally chartered banks, is consistent with

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[13] *Accord Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248 (1944) (invalidation only where state laws "infringe the national banking laws or impose an undue burden on the performance of the banks' functions"). *See also General Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990) (upholding New York's "Lemon Law" against a claim that a Federal Trade Commission decree preempted major elements of the local law; "[b]ecause consumer protection is a field traditionally regulated by the states, *compelling evidence* of an intention to preempt is required in this area.") (emphasis added); *Sherman*, 1995 N.J. LEXIS 1355, at *16-*17; (same); *Smiley*, 900 P.2d at 715 (Arabian, J., dissenting), at 716-17 (George, J., dissenting). *See generally* Scott, *The Patchwork Quilt: State and Federal Roles in Bank Regulation*, 32 Stan. L. Rev. 687, 690-95 (1980).

the long history of the dual banking system. One feature is that, in the words of this Court, "[n]ational banks 'are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation.' " *McClellan*, 164 U.S. at 356-57 (quoting *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1870)). Thus, as the Supreme Court of California stated in *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 216 Cal. Rptr. 345, 702 P.2d 503 (1985), " '[whatever] may be the history of federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the first National Bank Act in 1863"; thus, "[i]n only a few instances has Congress explicitly preempted state regulation of national banks . . . [and] the rule is that state laws apply. . . . " 702 P.2d at 520 (quoting *National State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980)).

Thus, under the preemption doctrine traditionally followed by this Court, Chase bears the burden of demonstrating federal preemption; indeed, under this Court's decision in *McClellan*, 164 U.S. at 357, it bears the impossible burden of demonstrating that application of California's ban on late charges unrelated to actual damages, as set forth in Cal. Civ. Code §1671(c)-(d), will in any sense *incapacitate* it from carrying out its duties as a federal instrumentality. *See Smiley*, 900 P.2d at 715 (Arabian, J., dissenting); *see also Perdue*, 702 P.2d at 520 (where a national bank failed to satisfy its burden to demonstrate federal preemption, a California court could properly apply the state's consumer protection laws in determining the validity of fees imposed by a national bank for processing "bounced" or "NSF" checks).

The courts below ignored (or misread) this well-settled precedent; in fact, in this case the California courts *reversed* the presumption against preemption. Even though recognizing that there were no clear statements in §85 of the National Banking Act or its legislative history of Congressional intent to preempt state regulation of liquidated damages on revolving credit accounts, nevertheless the court below held that Congress *intended* to preempt state law when it "lift[ed] [§]85's language and engraft[ed] it onto [§]521" of DIDA, and concluded that "Congress's intent to define 'interest' in the broadest sense for preemption purposes could not be more clear." A-27. Thus, as the court below reasoned in this case, whenever Congress enacts a federal statute, it *intends* to preempt state law unless it specifically states otherwise. *Id.* That analysis, however, directly conflicts with the preemption standards set forth by this Court in *Rice*, *McClellan* and *Cipollone* and presents yet another compelling reason why review should be granted in this case.

CONCLUSION

For the reasons stated herein, this Petition for Writ of Certiorari should be granted.

DATED: December 15, 1995

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

LESLIE U. HARRIS, On Behalf of Himself and All Others Similarly Situated, Plaintiff, vs. CHASE MANHATTAN BANK, N.A., and DOES 1 through 50, Defendants.	Case No. 941164 CLASS ACTION FIRST AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF 1. For Declaratory Judgment 2. Violation of Civil Code § 1671 3. Unlawful Business Practices in Violation of Business and Professions Code § 17200 4. Fraud and Deceit 5. Negligent Misrepresentation Plaintiff Demands A Trial By Jury

Plaintiff, on behalf of himself and all others similarly situated, makes the following allegations on information and belief based upon, *inter alia*, the investigation of its counsel.

INTRODUCTION

Plaintiff, by his attorney, brings this challenge to unlawful business practices on behalf of himself, a class

of all others similarly situated, and the general public. Plaintiff seeks damages, declaratory relief, and restitution and complaints and alleges as follows:

PARTIES

1. Plaintiff Leslie U. Harris is a resident of San Francisco County, California. Plaintiff brings this action both in his individual capacity and on behalf of all others similarly situated against the named defendant. Plaintiff has been the holder of a Chase Mastercard credit card and plaintiff brings this case on his own behalf and on behalf of all Chase Mastercard and Visa holders in California. Plaintiff has been charged late charges by defendant in San Francisco County. In so doing, plaintiff either directly or indirectly relied upon, *inter alia*, the representations, advertising, agreements and other promotional materials which were prepared and approved by the defendant and its agents and disseminated through advertising media and direct mail containing the misrepresentations and omissions alleged herein.

2. Defendant Chase Manhattan Bank, N.A., ("Chase") is a Delaware corporation with its principal place of business in New York, New York. Chase has charged the plaintiff and other similar situated persons a late charge. In fact, Chase charged plaintiff Harris a $10.00 late charge on February 20, 1992.

3. The true means and capacities of the defendants sued herein as Does 1 through 50 are unknown to plaintiff, who therefore sue them by such fictitious names. Plaintiff will amend this Complaint to allege the true names and capacities of these defendants when they have

been determined. These defendants are responsible in part for the acts and omissions alleged herein.

4. At all times herein mentioned in the causes of action into which this paragraph is incorporated by reference, each and every defendant was an agent of each and every other defendant. In doing the things alleged herein, each and every defendant was acting within the course and scope of this agency, and was acting with the consent, permission and authorization of each of the remaining defendants. All actions of each defendant alleged herein were ratified and approved by the officers or managing agents of every other defendant. This paragraph is not intended to allege a conspiracy of any type.

JURISDICTION AND VENUE

5. This court has jurisdiction over all causes of action asserted herein pursuant to the California Constitution, Article VI, § 10, because this case is a cause not given by statute to other trial courts.

6. This court has jurisdiction over defendant Chase because it is a corporation authorized to do business in California, registered with the Secretary of State of California, and does sufficient business in California and avails itself of the California market to render the jurisdiction of the California courts permissible under traditional notions of fair play and justice.

7. The damages suffered and sought to be recovered by plaintiff and the class he seeks to represent in the aggregate are in excess of the jurisdictional minimum of this court (although the individual claims of every class

member would not exceed this amount), but the exact amount of damages caused to the class members cannot be precisely determined without access to defendant's records. Venue is proper in this court since plaintiff, as well as thousands of class members, entered into an agreement with the defendant or its agents or subsidiaries and otherwise engaged in the transactions which form the basis of this action by paying the late charges in question and/or by entering into an agreement for the use of the subject credit cards distributed by defendant in San Francisco County.

CLASS ACTION ALLEGATIONS

8. Plaintiff brings this action on his own behalf and on behalf of all other persons similarly situated. The class which plaintiff seeks to represent is composed of all California residents who have been charged a late charge in connection with the use of a credit card issued by Chase since March 6, 1988. Plaintiff also challenges the legality of the late charges in a representative capacity on behalf of Chase credit card holders and the general public pursuant to Business and Professions Code §§ 17200 and 17204.

9. The class is composed of thousands of persons, the joinder of whom is impracticable, and the disposition of its claims in a class action will benefit both the parties and the court. The class is sufficiently numerous, since the defendant advertises, promotes, distributes and collects late charges from credit cards issued directly to California consumers.

10. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented. The questions of law and fact common to the class predominate over questions which may affect individual class members, including, but not limited to, the following:

(a) Whether and in what amounts Chase assessed late payment charges on credit cards accounts that are common to the class;

(b) Whether Chase's conduct violated Business and Professions Code § 17200, *et seq.*;

(c) Whether Chase's conduct violated California Civil Code § 1671(c) and (d), which circumscribe liquidated damages provisions in consumer transactions and agreements; and

(d) Whether Chase charged late fees under false pretenses by refusing and/or failing to disclose that such charges were illegal.

11. By paying the illegal late charges imposed by defendant, plaintiff is asserting claims that are typical of the claims of the entire class, and plaintiff will fairly and adequately represent and protect the interests of the class in that he has no interests antagonistic to those of the class. Plaintiff has retained counsel who are competent and experienced in class action litigation.

12. Plaintiff and the class have suffered irreparable harm and damages as a result of defendant's wrongful conduct as alleged herein. Absent a class action, defendant will likely retain the millions of dollars received through its wrongdoing. Because of the small size of the

individual class members' claims, few, if any, class members could afford to seek legal redress for the wrongs complained of herein. Absent a representative action, the class members will continue to suffer losses, allow the imposition of late charges to proceed without remedy and allow defendant to retain the proceeds of its ill-gotten gains. Even today the defendant continued to charge illegal late charges, thereby receiving further revenues and profits.

13. Plaintiff also challenges the legality of credit late charges in a representative action on behalf of Chase's credit card account holders and the general public pursuant to Business and Professions Code §§ 17200, 17203 and 17204. A representative action is appropriate and necessary because Chase had engaged in the acts described herein as a general business practice. Plaintiff requests that this court decide that the Late Payment Charge utilized by Chase is unlawful and unenforceable, and order Chase to make restitution to all affected cardholders and class members.

14. Notice of the pendency of this action can be given either by regular mail or by publication, which cost, under California law, can reasonably be imposed upon the defendant.

FIRST CAUSE OF ACTION

(Bank Card Agreement Authorizing Over-Limit and Late Charges and Late Payment Charges is Illegal)

15. Plaintiff realleges and incorporates herein as though fully set forth the allegations of ¶¶1-14 above.

16. Plaintiff and Chase were debtor and creditor, respectively, under the bank card agreement through which plaintiff obtained and maintained a credit card with Chase. The agreement between Chase and plaintiff was smaller or identical in all material respects to the agreements of other Chase consumer customers.

17. The credit cards issued by Chase to plaintiff and members of the class were used primarily for personal, family, or household purposes. Accordingly, the late charge provision of the Chase Card Agreement is void pursuant to Civil Code, § 1671(c) and (d), which prohibit the setting and/or collecting of excessive fixed damages amounts in anticipation of breach.

18. The terms, conditions and language of the Bank Card Agreement were created and drafted unilaterally – and entirely – by Chase. The provisions of the agreement were offered on a "take-it-or-leave-it" basis. Chase possessed vastly superior knowledge, experience, and expertise over any individual customer or cardholder in devising, defining, and describing the terms, conditions, and provisions of the agreement. Individual cardholders, class members and plaintiff were without sufficient bargaining power to compel Chase to negotiate, bargain for, and/or to obtain terms other than as promulgated by Chase.

19. With respect to payments, the bank card agreement requires that each cardholder must pay at least the minimum payment due shown on periodic statement by the payment due date. If not the bank card agreement authorizes Chase to impose a late charge of $10.00 each time a payment is late.

20. An actual controversy has arisen between plaintiff and defendant. Defendant Chase contends that it is entitled, by contract, to impose late charges on plaintiff's account. Plaintiff contends that the Bank Card Agreement which authorizes the late charges imposed by Chase on his accounts is illegal under Cal. Civil Code § 1671(c) and (d).

21. Plaintiff desires a judicial determination of his rights and obligations. Such a declaration is necessary and appropriate at this time in order that plaintiff may ascertain his rights and obligations and those of all class members.

SECOND CAUSE OF ACTION

(Unlawful Fixing of Damages In Anticipation of Breach of the Duty to Make Timely Periodic Payments)

22. Plaintiff realleges and incorporates herein as though set forth in full the allegations of ¶¶1-21 above.

23. The late charge provision of Chase's bank card agreement is void because it violates the prohibition in Civil Code, § 1671(d) against setting and/or collecting excessive fixed damages amounts in anticipation of breach.

24. Chase anticipated at the time plaintiff's accounts were opened, that from time to time plaintiff and other cardholders would breach their agreements with Chase by making payments after the date they were/are due, on the "due date" set forth on each monthly billing statement of Chase to its respective cardholders.

25. Chase's bank card agreement provides, *inter alia*, for the payment of late charges of $10.00 each in anticipation of breach of the obligation to make timely and sufficient payments.

26. All of Chase's bank card agreements contain the identical late payment charge terms, insofar as the agreements repeat common and similar language regarding monthly payments and late charges, and the amount charged to each account holder of Chase is the same for failure to perform according to the terms' express language.

27. At the time of the formation of the agreements between plaintiff and Chase, the amount of damages, if any, to be sustained by Chase by virtue of the credit cardholders' failure to make timely and sufficient monthly payments was, and now is, practicable and simple to ascertain, and was limited to the time value of money owed by respective cardholders and not received by Chase concerning particular periodic payments.

28. The bank card agreement expressly requires that a "minimum payment" be made for each monthly billing period. If the "minimum payment" is not received by Chase on or before the payment due date shown on the statement, the account holder has breached the agreement, and Chase imposed the $10.00 late payment charge.

29. At no time did Chase negotiate with plaintiff or other cardholders over the anticipated damages to Chase flowing from failure to pay as obliged. At no time did Chase disclose the true amount of actual damages to be sustained by Chase from plaintiff's breach, or breach by other cardholders, and this amount was known or should

have been known by Chase at the time of the formation of each respective agreement.

30. Plaintiff alleges, on the basis of information and belief, that the actual damages to be sustained or in fact sustained by Chase as a result of late and/or insufficient payments were less than the $10.00 charge imposed on plaintiff's and class members' accounts by Chase.

31. Plaintiff, class members and all Chase's cardholders have suffered monetary damage by reason of Chase's imposition of excessive late fee charges.

THIRD CAUSE OF ACTION

(Violations of California Business & Professions Code Section 17200, et seq.)

32. Plaintiff realleges and incorporates herein as though set forth in full the allegations of ¶¶1-31 above.

33. The Unfair Trade Practices Act defines unfair competition to include any "unfair," "unlawful," or "deceptive" business practice. Business and Professions Code § 17200. The Act provides injunctive relief, restitution, and disgorgement of profits for violations. *Id.* § 17203. The imposition of late charges by Chase has resulted in the unlawful, unfair and unjust collection and retention by Chase of substantial sums of money from its cardholders. Plaintiff requests that this court exercise its jurisdiction pursuant to the Unfair Trade Practices Act to order that Chase make restitution to plaintiff and ascertainable cardholders, and to disgorge all monies which it unlawfully obtained.

34. Chase acted unlawfully in that its practice of fixing and imposing excessive, punitive damages amounts as late charges in anticipation of breach and/or upon breach is expressly forbidden by § 1671(d) of the California Civil Code for any and all persons who utilize the credit card device for retail purchases of personal property or services primarily for the cardholder's personal, family, or household purposes. The overwhelming majority of credit cards issued and used pursuant to Chase's Bank Card program was expected or known by Chase to be intended by the cardholders to be used for the above-described purposes.

35. Chase's late charges imposed on plaintiff and all other cardholders were unfair in that:

(a) the amount of damages to be incurred by Chase was readily ascertainable before or at the time of formation of the agreement;

(b) the prospective cardholders were not permitted the opportunity to negotiate over the inclusion of the provisions in the agreement or the amounts called for by the terms of the agreement; and

(c) Chase knew or should have known that the terms and amounts constituted a penalty to compel performance and/or a scheme whereby Chase would accumulate excessive profits and thus unjustly be enriched at the direct expense of its cardholders.

36. Chase's imposition and collection of late charges is a business practice which is unlawful, unfair and deceptive. Pursuant to Business and Professions Code

§ 17203, *et seq.*, plaintiff and other cardholders are entitled to obtain restitution of all funds obtained by Chase by reason of Chase's unlawful, unfair, and/or deceptive practices and to disgorge all profits which Chase unlawfully and unfairly obtained. Plaintiff and cardholders are also entitled to an injunction of further unlawful, unfair and/or deceptive practices. Plaintiff and cardholders are also entitled to recover their reasonable attorneys' fees pursuant to Code of Civil Procedure § 1021.5.

FOURTH CAUSE OF ACTION

(Fraud and Deceit)

37. Plaintiff hereby incorporates by reference ¶¶1-36 above.

38. Defendant made several representations about late charges through its long-term advertising, promotional and marketing campaign.

39. These representations about late charges are false and misleading in that they falsely represent that defendant "may" lawfully impose a $10.00 late charge, thereby implying that $10.00 is a lawfully-arrived-at late fee. These representations are also misleading for failing to disclose that the costs reasonably related to collecting and accounting for late credit card payments were less than $10.00.

40. Defendant made, or should have made, efforts to apprise itself with all applicable laws governing credit card late charges through its lawyers and others. Defendant was aware, or should have been aware, both before

and after the November 12, 1991 decision in *Beasley v. Wells Fargo Bank,* 235 Cal. App. 3d 1383 (1991) that a $10.00 late charge may be unlawful. Defendant knew or recklessly disregarded that: (1) the costs reasonably related to collecting and accounting for a late charge were less than $10.00; and/or (2) overstated the costs reasonably related to collecting and accounting for a late charge to justify the imposition of a $10.00 late charge by including costs that were not directly caused by a late payment; and/or (3) inflating the actual costs reasonably related to collecting and accounting for a late charge. The amount of costs reasonably related to collecting and accounting for late charges is within the exclusive knowledge of defendant and not open to examination and inquiry by plaintiff and the class members. Such representations and/or omissions, were made with the intent to defraud and induce plaintiff's and all class members' reliance as evidenced by the request for and actual payment of such late charges.

41. Plaintiff and the class members, unaware of the falsity of defendants' representations, and/or omissions, paid the illegal late charges, reasonably relying upon the representations of the defendant that such a late charge could lawfully be imposed.

42. As a proximate result of the defendant's active misrepresentations or concealments of material facts regarding the illegality and/or setting of the late charges, plaintiff and the class have suffered damages through its payment of said late charges. The total amount of damages suffered by plaintiff and members of the class as a result of its payments cannot be fully ascertained without

access to defendant's records and will be proven at the time of trial.

43. Defendant's suppression and/or misrepresentation of the material facts set forth above defrauded plaintiff and the class, in violation of California Civil Code §§ 1572, 1709 and 1710, as well as principles of common law, for which plaintiff and members of the class are entitled to recover compensatory damages, interest, and attorneys' fees and costs.

44. Defendant's conduct described herein was done with conscious disregard of plaintiff's rights and with the intent to vex, injure or annoy plaintiff and members of the class such as to constitute oppression, fraud or malice under California Civil Code § 3294, entitling plaintiff and the members of the class to an award of punitive damages, in an amount appropriate to punish or set an example of defendant.

FIFTH CAUSE OF ACTION

(Negligent Misrepresentation)

45. Plaintiff incorporates by reference ¶¶1-44 above.

46. In making the representations of fact to plaintiff and the members of the class described herein, the defendant failed to fulfill its duty to disclose the material facts set forth above. Defendant's partial disclosure that it would impose a late charge gave rise to a duty to disclose the costs reasonably related to collecting and accounting for late credit card payments. Moreover, defendant had a duty to estimate the fair average compensation for any loss it sustained as a result of collecting and accounting

for late credit card payments in order to justify the late charge under Civil Code § 1671. Among the direct and proximate causes of said failure to disclose was the negligence and carelessness of the defendant.

47. Plaintiff, unaware of defendant's affirmative misrepresentations and its failure to disclose the fact that the late charges it was imposing were unconscionable and illegal, paid the improper late charges. Had plaintiff known the true facts, he would not have taken such action. By reason thereof, plaintiff and the other class members have suffered damages in an amount according to proof at the time of trial, plus interest, attorneys' fees and costs.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays:

1. That this action may be maintained as a class action and as a representative action under the Business and Professions Code § 17200, *et seq.*;

2. That this court issue a declaration of the respective rights and obligations of the parties, concluding that the late charges imposed by Chase were illegal and unfair;

3. That plaintiff, cardholders, and members of the class be awarded actual and punitive damages, including prejudgment interest in an amount according to proof against Chase;

4. That Chase be ordered to make restitution to all ascertainable cardholders for any and all amounts collected by Chase through its unlawful and unfair business

practices alleged above, including interest on the sums wrongfully collected, and to disgorge all profits which resulted from Chase's unlawful and unfair business practices;

5. That plaintiff be awarded reasonable attorneys' fees, expenses and costs of suit; and

6. That plaintiff be awarded such other and further relief as the court may deem appropriate, just, and proper.

DATED: October 6, 1992

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JURY DEMAND

Plaintiff demands a trial by jury.

DATED: October 7, 1992

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF
SAN FRANCISCO

LESLIE U. HARRIS, On Behalf of Himself and All Others Similarly Situated, Plaintiff, v. THE CHASE MANHATTAN BANK, N.A.; THE CHASE MANHATTAN BANK (USA); and DOES 2 through 50, Defendants.	No. 941164 ORDER SUSTAINING DEFENDANTS' DEMURRER WITHOUT LEAVE TO AMEND AND ENTRY OF JUDGMENT OF DISMISSAL Date: January 19, 1993 Time: 9:30 a.m. Dept: 9

The general demurrer of defendants The Chase Manhattan Bank, N.A. and The Chase Manhattan Bank (USA) to plaintiff's First Amended Complaint came on for hearing in Department 9 of this Court on January 19, 1993, the Honorable Lucy Kelly McCabe, presiding. Palmer Brown Madden of McCutchen, Doyle, Brown & Enersen and Alan S. Kaplinsky of Wolf, Block, Schorr and Solis-Cohen appeared as counsel for defendants, and Alan M. Mansfield of Milberg Weiss Bershad Specthrie & Lerach appeared as counsel for plaintiff.

Plaintiff's First Amended Complaint challenges the legality of a $10.00 late charge assessed by Chase pursuant to the terms of the agreement between Chase and its California credit card customers. Plaintiff asserts five causes of action in his First Amended Complaint for

declaratory judgment, violation of Civil Code section 1671 (pertaining to liquidated damages upon breach of contract), violation of Business and Professions Code sections 17200 and 17500 (pertaining to unfair, unlawful or fraudulent business acts and practices, and false and misleading advertising), violation of Civil Code sections 1572, 1709 and 1710 (pertaining to fraud, deceit and negligent misrepresentation) and state common law.

The Court, having reviewed and considered the First Amended Complaint on file herein, the supporting and opposing memoranda of points and authorities, having heard the arguments of counsel, and good cause appearing therefor:

IT IS HEREBY ORDERED that defendants' general demurrer be, and hereby is, sustained without leave to amend on the ground that all of the causes of action alleged in plaintiff's First Amended Complaint are preempted by section 85 of the National Bank Act (12 U.S.C. § 85) and section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (12 U.S.C. § 1831d).

IT IS FURTHER ORDERED that judgement of dismissal shall be, and hereby is, entered in favor of defendants.

DATED: February 3, 1993

/S/
LUCY KELLY MCCABE
JUDGE OF THE SUPERIOR COURT

Approved as to form:

BUSHNELL, CAPLAN & FIELDING

/S/
Alan M. Caplan

Attorneys for Plaintiff

McCUTCHEN, DOYLE, BROWN & ENERSEN

/S/
Daniel E. Birkhaeuser

Attorneys for Defendants
The Chase Manhattan Bank, N.A.
and the Chase Manhattan Bank (USA)

[No. A060791. First Dist., Div. Two Nov. 17, 1994.]

LESLIE U. HARRIS et al., Plaintiffs and Appellants, v. CHASE MANHATTAN BANK, N.A., et al., Defendants and Respondents.

SMITH, J. – Plaintiff and appellant Leslie U. Harris appeals from a summary judgment dismissing his class action on behalf of himself and all others similarly situated against defendant-respondent Chase Manhattan Bank, N.A. (Chase) for damages and injunctive relief as the result of allegedly unlawful late fees charged to Chase's credit cardholders.

The trial court granted judgment for Chase on the ground that plaintiff's state law-based action was preempted by section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA) (Pub.L.No. 96-221 (Mar. 31, 1980) 94 Stat. 132). Supported by the near unanimous weight of authority, we will affirm.

BACKGROUND

The facts are simple and undisputed. Until 1990, Chase was a national banking association located in Delaware. Since June 21, 1990, Chase has been a federally insured state chartered bank located in Delaware.

Chase issues Visa and MasterCard credit cards to customers in California. Plaintiff was the holder of a Chase MasterCard residing in the City and County of San Francisco. Under the cardholder agreement, each cardholder must make a minimum payment by the due date on the periodic statement. If the cardholder fails to make such payment by the due date, Chase is authorized to change a $10 late fee as a result of the cardholder's breach of his obligation to make timely payments. On February 20, 1992, Chase assessed a $10 late charge to plaintiff's account under the provisions of the foregoing agreement.

In an amended complaint brought on behalf of himself and other similarly situated cardholders, plaintiff alleges that the late charge constitutes a liquidated damages penalty in violation of Civil Code Section 1671 (section 1671) and California law. He seeks both damages and injunctive relief pursuant to Business and Professions Code sections 17200 and 17204.

Chase demurred to the complaint on federal preemption grounds. Relying on *Greenwood Trust Co. v. Com. of Mass.* (1st Cir. 1992) 971 F.2d 818, certiorari denied (1993), ___ U.S. ___ [122 L.Ed.2d 129, 113 S.Ct. 974] (*Greenwood Trust*) the trial court found that plaintiff's action against Chase was preempted by the National Banking Act (NBA), section 85 (12 U.S.C. § 85) and DIDA, section 521

(12 U.S.C. § 1831d). The demurrer was sustained without leave to amend and plaintiff appeals from the judgment of dismissal.

APPEAL

This case is one of many recent class actions brought throughout the country in which credit cardholders have challenged loan fees assessed by either national banks or those chartered in foreign states as violative of their own states' consumer protection laws.

The gravamen of plaintiff's action is that the credit card late fee charged by Chase violates California law because it is in the nature of a penalty or liquidated damages for breach of the credit card agreement, having no relation to the actual damages incurred by Chase as a proximate result of such breach. (*See* § 1671; *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1383, 1398-1401 [1 Cal.Rptr.2d 446].) Under the law of Chase's home state of Delaware, the subject late fee fits within the definition of "interest" and is perfectly legal. (*See* Del. Code Ann. tit. 5, §§ 945, 950.) (1a). The question presented here is whether, by virtue of DIDA section 521, Chase may "export" Delaware's law applicable to late fees, even though it may conflict with California law governing liquidated damage penalties.

Section 85 of the NBA, enacted by Congress in 1864, provides that a national bank "may take, receive, reserve and charge on any loan . . . *interest at the rate allowed by the laws of the State . . . where the bank is located,* or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in

the Federal reserve district where the bank is located, whichever may be the greater. . . . " (Italics added.)

The intent of section 85 was to protect national banks from discriminatory state banking laws and insure " 'competitive equality' " between state and national banks. (See *Greenwood Trust, supra,* 971 F.2d 818, 826, n.6; *Marquette v. First Nat. Bank of Omaha Corp.* (1978) 439 U.S. 299, 314 [58 L. Ed. 2d 534, 545, 99 S.Ct. 540] (*Marquette*).)

Ten years after the NBA was enacted, the United States Supreme Court announced the "most favored lender" doctrine pursuant to which national banks could not be placed at a competitive disadvantage with respect to any state-regulated lender. (*Tiffany v. National Bank of Missouri* (1873) 85 U.S. (18 Wall.) 409 [21 L.Ed. 862].) The doctrine has been interpreted to mean that national banks must be given the same interest rate privileges as any person or entity in the state lending money under like conditions. (See *Fisher v. First Nat. Bank of Chicago* (7th Cir. 1976) 538 F.2d 1284, 1289-1290.) In *Marquette, supra,* the court went one step further and held that section 85 permitted a national bank to "export" a favorite credit card interest rate from the state in which it was located to customers in another state. (439 U.S. at pp. 317-319 [58 L.Ed.2d at pp. 547-548].)

DIDA was enacted in 1980 following an enormous credit crunch in which interest rates rose to record levels. National banks, which could lend money at 1 percent above the Federal Reserve discount rate, enjoyed a distinct competitive advantage over their State-chartered counterparts, which were bound by often restrictive state usury laws. In order to equalize this advantage, Congress

enacted legislation permitting state-chartered banks to export the interest rates of their home states abroad, as national lending institutions had been doing through the NBA. *Greenwood Trust, supra,* 971 F.2d 818, 826; *Stoorman v. Greenwood Trust Company* (Colo.Ct.App. Apr. 7, 1994) [Dock. No. 93CA0224] ___ P.2d ___ (*Stoorman*).) Consequently, section 521 of DIDA borrowed language extensively from section 85, but also added a preemption clause. It provides that "[i]n order to prevent discrimination against state-chartered insured depository institutions . . . with respect to interest rates," a state bank "may, *notwithstanding any State constitution or statute which is hereby preempted* for the purposes of this section," charge interest at the "rate allowed" by the laws of its home state, or 1 percent over the federal reserve discount rate, whichever is greater. (12 U.S.C. § 1831d(a), italics added.)

It was against this background that *Greenwood Trust* was decided. The issue there was whether a federally insured bank chartered in Delaware could impose late fee charges on its credit cardholders residing in Massachusetts, which fees were prohibited by a Massachusetts consumer protection statute.

The First Circuit held that the Massachusetts statute was substantively preempted under section 521, employing the following reasoning: (1) due to the unequivocal preemption language of the statute, if section 521 preempts state law, it does so expressly and not by implication; (2) in order to "level the playing field" in interest rate competition between national and state banks, Congress enacted DIDA, copying section 85's language with regard to interest rates; included within that language was the "exportation" principle as defined in *Marquette;*

(3) federal case law interpreting section 85 has consistently defined the term "interest" broadly to include not only numerical percentage rates but late fees and kindred charges in connection with the lending of money; (4) DIDA therefore permits a state bank to export its home State's entire usury law, including that state's expansive definition of interest; (5) under either federal common law or the law of Delaware late fees constitute "interest"; and thus (6) Massachusetts law prohibiting late fees must yield to the preemptive force of section 521. (*Greenwood Trust, supra,* 971 F.2d at 823-829.)

We agree with *Greenwood Trust*'s reasoning, as have a plethora of state and federal cases nationwide holding that either section 85 or section 521 preempt contrary state laws regulating late charges and other flat fees in connection with credit card lending. *Stoorman, supra,* ___ P.2d at ___; *Ament v. PNC Nat. Bank* (W.D.Pa. 1992) 825 F.Supp. 1243; *Watson v. First Union Nat. Bank of South Carolina* (D.S.C. 1993) 837 F.Supp. 146 [overlimit fees]; *Goehl v. Mellon Bank (DE)* (E.D.Pa. 1993) 825 F.Supp. 1239; *Tikkanen v. Citibank (South Dakota) N.A.* (D.Minn. 1992) 801 F. Supp. 270 (*Tikkanen*); *Hill v. Chemical Bank* (D.Minn. 1992) 799 F. Supp. 948 (*Hill*); *Nelson v. Citibank (South Dakota) N.A.* (D.Minn. 1992) 794 F.Supp. 312 (*Nelson*).

(2) Two federal banking agencies, the Office of the Comptroller of the Currency (OCC) (OCC Interp. Letter, 452 Fed. Banking L. Rep. (CCH) ¶85,676 (Aug. 11, 1988)) and the Federal Deposit Insurance Corporation (FDIC) (*Hill, supra,* 799 F.Supp. at 953) have also taken the view that state laws regulating late charges by banks are preempted by federal banking statutes. The opinions of these agencies are entitled to deference by the courts. (*Clarke v.*

Securities Industry Assn. (1987) 479 U.S. 388, 403-04 [93 L.Ed.2d 757, 771-772, 107 S.Ct. 750] [OCC]; *FDIC v. Philadelphia Gear Corp.* (1986) 476 U.S. 426, 439 [90 L.Ed.2d 428, 439-40, 106 S. Ct. 1931] [FDIC]; *see also Conservatorship of Lambert* (1983) 143 Cal.App.3d 239, 244 [191 Cal.Rptr. 725] ["Interpretations of a federal statute by a federal agency, although not binding on the courts, are entitled to great weight. [Citations.]"].)

(1b) Plaintiff claims that the *Greenwood Trust* court wrongly applied a presumption in *favor* of preemption instead of the proper standard of presuming lack of preemption unless congressional intent appears unmistakable. (See *Cippollone v. Liggett Group, Inc.* (1992) ___ U.S. ___, ___ [120 L.Ed.2d 407, 422-423, 112 S. Ct. 2608, 2617]; *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1072, [31 Cal.Rptr.2d 358, 875 P.2d 73] (*Mangini*).)

This argument overlooks the fact even before the enactment of section 521, federal courts had consistently construed the term "interest" in section 85 to embrace not only periodic percentage rates but a host of other fees incidental to the loaning or forbearance of money. (*Citizens' National Bank v. Donnell* (1904) 195 U.S. 369, 373-374 [49 L.Ed. 238, 241-42, 25 S.Ct. 49] [overdraft charges]; *Northway Lanes v. Hackley Union Nat. Bank & Trust Co.* (8th Cir. 1972) 464 F.2d 855, 863 [closing costs]; *Fisher v. First Nat. Bank of Omaha* (8th Cir. 1977) 548 F.2d 255, 258-261 [38 A.L.R.Fed. 792] [credit card cash advance fees]; *Panos v. Smith* (6th Cir. 1940) 116 F.2d 445, 446-447 [taxes and recording fees]; *Cronkleton v. Hall* (8th Cir. 1933) 66 F.2d 384, cert. den., 290 U.S. 685 [78 L.Ed. 590, 54 S.Ct. 121] [bonus or commission paid to lender].)

In lifting section 85's language and engrafting it onto section 521, Congress is presumed to have been aware of prior judicial decisions interpreting the older statute (*Holmes v. SIPC* (1992) ___ U.S. ___ [117 L.Ed.2d 532, 543-544, 112 S.Ct. 1311, 1317-1318), including the courts' sweeping construction of the term "interest." (*Greenwood Trust, supra,* 971 F.2d 818, 827.)[1] Viewed from this historical perspective, Congress's intent to define "interest" in the broadest sense for preemption purposes could not be more clear.

(3) Nor are we impressed by plaintiff's attempt to distinguish *Greenwood Trust* on the basis that the Massachusetts statute *prohibited* late fees whereas California only places certain limits on them. *Greenwood Trust*'s analysis is unaffected by whether the bank customer's state restricts late charges or totally bans them. In both cases, the issue turns on whether a bank chartered in another state can "export" its home state's definition of late charges as interest under the preemptive umbrella of section 521.

(4) Plaintiff also faults *Greenwood Trust* for not grasping the difference between "up-front" loan charges, which are *required* by the lender, and late fees, which are

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[1] Cases cited by plaintiff and amicus Bankcard Holders of America which purportedly exclude late charges from the "federal common law" meaning of the term "interest" (e.g., *United States v. Texas* (1993) ___ U.S. ___ [123 L.Ed.2d 245, 253, 113 S.Ct. 1631, 1635]; *Johnson v. McCrackin-Sturman Ford, Inc.* (3d Cir. 1975) 527 F.2d 257, 265-266 [34 A.L.R.Fed. 450]; *In re Tastyeast, Inc.* (3d Cir. 1942) 126 F.2d 879, 881-882; *Lloyd v. Scott* (1830) 29 U.S. (4 Pet.) 205, 224 [7 L.Ed. 833, 839]) are not apposite, since none of them construed either section 85 or section 521.

contingent and the imposition of which is within the control of the borrower. He suggests that the former charges are more akin to "interest" whereas the latter are in fact penalties for breach of contract. Ancient federal cases holding that late penalties for loan delinquency are not usurious (*Spain v. Hamilton's Administrator* (1863) 68 U.S. (1 Wall.) 604, 626 [17 L.Ed. 619, 625-626]; *In re Tastyeast, Inc., supra,* 126 F.2d 879, 882) lend only superficial support to his position, for none of them interpreted section 85 or 521.

The cases interpreting section 85 do not recognize plaintiff's contingent/noncontingent distinction. Indeed, many of the types of lender-imposed fees which federal courts have deemed embraced within that statute's broad definition of interest were also "contingent" in the sense that they were in the control of the borrower (see cases cited pp. 1571-1572, *ante*). Furthermore, under section 85 (and by implication section 521) a bank may export not only its home state's periodic interest rate, but its *entire body of usury law,* even though it may conflict with the law of the customer's state of residents. (*First National Bank in Mena v. Nowlin* (8th Cir. 1975) 509 F.2d 872, 876; *Fisher v. First Nat. Bank of Omaha, supra,* 548 F.2d 255, 257-258). Thus, "[t]he fact that one state considers late fees to be penalties that do not implicate the usury laws does not by itself invalidate another state's determination that late fees are a component of the interest rate." (*Tikkanen, supra,* 801 F.Supp. 270, 278-279.) And under *Marquette,* Delaware's definition of interest may be exported

to Chase's California customers, notwithstanding its conflict with California law.[2]

(5) Citing *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913 [216 Cal.Rptr. 345, 702 P.2d 503] (*Perdue*), plaintiffs claim that our Supreme Court has already determined that DIDA preempts only state usury law, not traditional contract law governing liquidated damages.

The issue in *Perdue* was whether a national bank *located in California* could collect nonsufficient funds charges on deposit accounts under California law. The bank contended that plaintiff's claims were preempted by a "comprehensive federal statutory scheme" intended to displace state law in the field. *Perdue* dealt with section 501 of DIDA, which was conspicuously silent with respect to deposit services. It did not discuss section 521, which has a specific preemption clause pertaining to loans and interest rates. The court never addressed the crucial subject matter presented here, i.e., the interplay between the presumption clause and the meaning of the

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[2] Classifying late charges as "interest" does no violence to the dictionary definition of the latter term, i.e., "[C]ompensation allowed by law or fixed by the parties for the use or forbearance or detention of money." (Black's Law Dict. (5th ed. 1979) at p. 729.) The cardholder who is late in tendering the minimum monthly payment enjoys use of that money in the meantime and the late charge compensates the lender for such forbearance. (See *Greenwood Trust, supra*, 971 F.2d 818, 825.)

Accordingly, we do not share the fear expressed by plaintiff and his amici curiae at oral argument that our holding will allow individual states to enact laws which define "interest" to include any kind of fees it pleases and that state's banks to export such excessive or outlandish charges to its out-of-state customers under the guise of "interest."

term "interest" as it is used in section 521. As the *Greenwood Trust* court observed, cases construing section 501 of DIDA are of little help in interpreting section 521. "In light of the irrefutable evidence that section 521 was conceived as an offspring of section 85 of the [NBA], we believe . . . [t]he proper analogy in this case is to compare lineal descendants who share common language and purpose, not distant cousins who share little more than a name." (971 F.2d 818, 830, n.10.)

(6) Taking a different tack, amici curiae supporting plaintiff focus on that portion of the section 521 which states "notwithstanding any *State constitution or statute* which is hereby preempted for the purposes of this section . . . " (12 U.S.C. § 1831d(a), italics added) to argue that Congress intended to preempt only state statutes and constitutions which affect the meaning of the term "interest," not common law.

This argument is hardly persuasive. First, given the unmistakable intent of Congress to "level the playing field" and create lending party between state and national banks by preempting inconsistent statutes and state constitutions, an enormous loophole in the statute would be created if states were allowed to eviscerate this policy through the back door of the common law. As the FDIC recognizes, it is highly unlikely that Congress could have intended such a result. (Advisory Opn. No. FDIC 93-27 Fed. Banking L. Rep. (CCH) ¶ 81,635 (July 12, 1993).) Second, section 521 contains no savings clause which would evince an intent to preserve state common law claims, which Congress has done in other contexts. (E.g., 15 U.S.C. § 4406(c) ["Nothing in this chapter shall relieve any person from liability at common law. . . . "];

49 U.S.C. § 1506 ["Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law. . . . "]; *see Stoorman, supra,* ___ P.2d ___.) Third, plaintiff's claims *are* statutory in nature. They are grounded on the prohibition against liquidated damage penalties set forth in section 1671. The fact that section 1671 was a codification of preexisting case law does not, as plaintiff seems to imply, convert his action into one at common law.

In the face of the overwhelming number of state and federal cases which are in opposition to his position, plaintiff cites two cases which purportedly support it, *Donald v. Golden 1 Credit Union* (E.D.Cal. 1993) 839 F.Supp. 1394 (*Donald*) and *Irwin v. Citibank (South Dakota) N.A.* (Pa.Ct. C.P. Dec. 9, 1993) No. 9112-2557.

We will not discuss *Irwin*, a nonpublished decision of an out-of-state trial court.[3] The issue in *Donald* was not substantive preemption but jurisdictional preemption. That case turned on whether the preemptive force of sections 85 and 86 of the NBA was so extraordinary as to convert complaints asserting state law claims for unlawful contract penalties into federal claims for usury. *Donald* did not adjudicate the question of substantive preemption which we face here.

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[3] Each side requests judicial notice of certain cases and has filed certain objections to the other side's request for judicial notice. We will not arbitrate this debate. Where appropriate, we will take note of state, federal and agency decisions which we find illuminating, guided only by the restrictions set forth in California Rules of Court, Rule 977 and our own common sense. (See *Mangini, supra,* 7 Cal. 4th 1057, 1064-1065.)

(7) Finally, amicus curiae Bankcard Holders of America suggests that interpreting section 521 in the manner suggested by *Greenwood Trust* in effect allows Delaware to define what constitutes "interest" for California's consumers. This construction, the argument runs, constitutes an impermissible delegation by Congress of this state's legislative powers to another state.

Congress, however, may properly choose to adopt definitional terms from the law of another state in pursuit of its overall objective of regulating banking. (*Greenwood Trust, supra,* 971 F.2d 818, 829.) As the Supreme Court recognized in *Marquette,* incorporation of the " 'exportation' " principle into federal banking law inevitably impairs the ability of some states to protect its citizens against what they perceive to be unfair lending practices. The court, however, did not view that impairment as a constitutional hurdle but simply "an issue of legislative policy" better left to the wisdom of Congress. (439 U.S. 299, 318-19 [58 L.Ed.2d 534, 547-48].)

(1c) We conclude that because Chase is chartered in Delaware, section 521 and the supremacy clause mandate that Delaware rather than California law controls its imposition of late charges on plaintiff's credit card account. The trial court thus correctly determined that plaintiff's complaint based on Chase's alleged violation of California restrictions on such charges, is preempted.

DISPOSITION

Affirmed.

Kline, P.J., and Phelan, J., concurred.

No. 1/2 A060791 - S044161

IN THE SUPREME COURT OF CALIFORNIA

IN BANK

LESLIE U. HARRIS et al., Appellants

v.

CHASE MANHATTAN BANK, N.A. et al., Respondents

Review ordered on the court's own motion.

Submission of additional briefing, otherwise required by rule 29.3, Cal. Rules of Court, is deferred pending further order of the court.

DATE: February 23, 1995

Lucas
Chief Justice

Mosk
Associate Justice

Kennard
Associate Justice

Arabian
Associate Justice

Baxter
Associate Justice

George
Associate Justice

Werdegar
Associate Justice

No. 1/2 A060791 - S044161

IN THE SUPREME COURT OF CALIFORNIA

IN BANK

LESLIE U. HARRIS et al., Appellants

v.

CHASE MANHATTAN BANK, N.A. et al., Respondents

Pursuant to rule 29.4(c), California Rules of Court, the above-entitled review is DISMISSED and cause is remanded to the Court of Appeal, First Appellate District, Division Two.

DATE: November 2, 1995

Lucas
Chief Justice

Mosk
Associate Justice

Kennard
Associate Justice

Arabian
Associate Justice

Baxter
Associate Justice

George
Associate Justice

Werdegar
Associate Justice